Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions of the Telecommunications	)	
Act of 1996	)	
	)	
Petition of NuVox, Inc. for Declaratory	)	
Ruling	)	

JOINT COMMENTS OF WORLDCOM, INC. AND THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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EXECUTIVE SUMMARY

BellSouth has sought unlimited EEL audits of NuVox and a number of other competitive carriers, to be performed by an entity that does not meet Commission-approved standards for auditor independence. The Commission should put an end to this fishing expedition by declaring that no EEL audit may be conducted unless the ILEC can articulate a bona fide, particularized concern of non-compliance for every circuit which it seeks to audit. The Commission should also declare that a consulting firm that views an audit as "successful" when it generates revenue for its clients, is not "independent" in any meaningful sense of the word.

The Commission should establish a moratorium on EEL audits. As the Commission recognized in 1999, it makes no sense to conduct these audits when the underlying rules will be in place for no more than a matter of months. As of now, it is difficult to imagine that the existing use restriction will survive appellate court review *and* the Commission's own *Triennial Review*, both of which will be completed in a matter of months. In this circumstance, the Commission should put a stop to all EEL audits. They should be resumed only in the unlikely event that the current use restriction retains any relevance in the future.

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JOINT COMMENTS OF WORLDCOM, INC. AND THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

I. Introduction

In November of 1999, the Commission adopted a "temporary constraint on the use of unbundled loops and transport circuits to provide exchange access."[1] At that time the Commission repeatedly and forcefully committed to resolving its "temporary constraint" by no later than June 30, 2000.[2] Now, nearly two years after the date when that "temporary constraint" was to have been resolved, a competitive carrier has brought to the Commission's attention yet another example of the potential for mischief inherent in any use restriction, particularly in this "temporary constraint." Pursuant to Public Notice DA 02-1302 (rel. June 4, 2002), WorldCom, Inc. (WorldCom) and the COMPETITIVE TELECOMMUNICATIONS ASSOCIATION (CompTel) (Joint Commenters) submit these comments in support of the NuVox petition for declaratory ruling (filed May 17, 2002).

[1] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*,* CC Docket No. 96-98, *Supplemental Order* (rel. November 24, 1999), ¶ 7.
[2] *Id.,* ¶¶ 2, 4.

II. Background

In implementing the Telecommunications Act of 1996, the Commission recognized that its mandate "under the 1996 Act is the opening of one of the last monopoly bottleneck strongholds in telecommunications – the local exchange *and exchange access markets* – to competition."[3] At that time, the Commission specifically addressed the question whether the essential network facilities the Act required incumbent local exchange carriers (ILECs) to share at cost-based rates could be used to provide all telecommunications services, or only local services. The Commission concluded that the Act's plain words dictated that all telecommunications services could be provided through unbundled network elements (UNEs). As it explained, "Section 251(c)(3) [of the Act] does not impose any service-related restrictions or requirements on requesting carriers in connection with the use of unbundled network elements."[4] The Commission went on to conclude that its interpretation was "compelled by the plain language of the 1996 Act."[5]

The Commission's commitment to the use of UNEs to provide exchange access services in competition with ILEC exchange access services, became the centerpiece of another chapter in the so-called "competitive trilogy."[6] On May 16, 1997, the Commission released its *Access Charge Reform Order.* Therein, the Commission

[3] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order* (rel. August 8, 1996)(*Local Competition Order*), ¶ 4 (emphasis added).
[4] *Id.,* ¶ 264.
[5] *Id.,* ¶ 356.
[6] In 1996, both Congress and the Commission recognized that for competition to proceed, universal service subsidies that might be implicit in access charges would have to be removed and made explicit. The Commission saw the implementation of Section 251, universal service reform, and access charge reform as three integral parts of a "competitive trilogy." *Local Competition Order,* ¶ 6.

adopted a "market-based approach to reforming access charges."[7] By that, the Commission meant that exchange access competition based, in part, on the use of UNEs, would bring about "interstate access charges [that] ultimately reflect the forward-looking economic costs of providing interstate access services."[8] Indeed, the Commission explicitly relied on the purported ability of interexchange carriers (IXCs) to "obtain unbundled network elements quickly, at economic cost, and in adequate quantities," as its primary rationale for rejecting concerns that without a prescription of cost-based access charges, ILECs could subject their competitors to a price squeeze.[9]

Thus, the question of whether requesting carriers could use UNEs to provide exchange access services appeared to be settled well before the Commission adopted the *Supplemental Order*. By mid-1997, it was Commission policy that the availability of UNEs at cost-based rates would protect IXCs from the threat of a price squeeze upon ILEC entry into interexchange markets. For reasons it has never clearly articulated, the Commission reversed course in 1999.

In 1999, the ILECs urged the Commission to restrict a requesting carrier from obtaining existing loop and transport combinations as UNEs in order to prevent those carriers from bypassing special access services.[10] In the *UNE Remand Order* itself, the Commission rejected these self-serving pleas out of hand, emphasizing that "it would be impermissible for an incumbent LEC to require that a requesting carrier provide a certain

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[7] In the Matter of Access Charge Reform, CC Docket No. 96-262, *First Report and Order* (*Access Charge Reform Order*), ¶ 263.
[8] *Id.,* ¶ 262.
[9] *Id.,* ¶ 280.
[10] *See, e.g.,* In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking* (rel. November 5, 1999)(*UNE Remand Order*) at ¶ 483, citing *ex parte* filings of BellSouth and SBC.

amount of local service over such facilities."[11] At that time, the Commission found that the record was insufficient "to determine whether or how our rules should apply in the discrete situation involving the use of dedicated transport links between the incumbent LEC's serving wire center and an interexchange carrier's switch or point of presence (or 'entrance facilities')."[12] Accordingly, the Commission sought further comment on this discrete issue – whether there was any statutory or regulatory basis under which ILECs could decline to provide entrance facilities at cost-based rates.[13]

Three weeks later, in response to intense lobbying from the ILECs, the Commission released the *Supplemental Order*. Therein, the Commission abandoned the pretense that there was some "discrete" issue that required further consideration. Instead, the Commission broadly restricted the uses that competitive carriers might make of combined loop and transport elements, to those instances where they are used "to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer."[14] As stated above, the Commission viewed this as a "temporary constraint" – one that could not conceivably extend past June 30, 2000. Indeed, so confident was the Commission that this constraint was only temporary, that it prohibited ILECs from using audits to investigate "whether or not requesting carriers are using unbundled network elements solely to provide exchange access service."[15]

Thus, a discrete issue was converted to a broad constraint. All that remained for the ILECs was to make this "temporary constraint" indefinite in duration. The

[11] *Id.,* ¶ 486.
[12] *Id.,* ¶ 489.
[13] *Id.,* ¶ 494.
[14] *Supplemental Order,* ¶ 2.
[15] *Id.* at ¶ 5, footnote 9.

Supplemental Order Clarification achieved this result perfectly.[16] In purporting to clarify the meaning of "a significant amount of local exchange service," at the behest of the ILECs and a few CLECs (which later suffered a severe case of "buyer's remorse"), the Commission established three unworkable "safe harbors," which remain in place today. It is fair to say that the only things safe in these harbors are the ILECs' bloated special access revenues.

The *Supplemental Order Clarification* has yielded unabated controversy. It is so unworkable that at least two competitive providers have sought a waiver of its Byzantine requirements. It has also given rise to at least one formal complaint, an open forum held by the Common Carrier Bureau to address the frustrations of competitors, and numerous *ex parte* filings on the ways in which the ILECs have used the language in that order as a basis for rejecting UNE requests. NuVox now joins the list of companies harmed by the Commission's departure from the dictates of the Act's plain language, and its failure to resolve this "temporary constraint."

III. The *Supplemental Order Clarification*

Before proceeding to the specific issues raised in NuVox's petition, it may be useful to review the "safe harbors" endorsed by the *Supplemental Order Clarification.* According to that order, "a requesting carrier is providing a 'significant amount of local exchange service' to a particular customer if it meets one of three circumstances."[17] No indication is given if, for any of these circumstances, this consists of a backward-looking inquiry into past behavior or a prediction about the customer's behavior in some relevant

[16] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Supplemental Order Clarification* (rel. June 2, 2000).
[17] *Id.,* ¶ 22.

future time period (e.g., a day, a month, or the term covered by a carrier's interconnection agreement).

The first safe harbor is, in some ways, the simplest. A requesting carrier need only "certify" that it is the "exclusive" provider of a customer's local exchange service.[18] The circuit in question must terminate in a collocation arrangement and cannot be "connected to the incumbent LEC's tariffed services."[19] However, this seemingly simple construction leaves a number of unanswered questions. For example, is the exclusivity requirement limited to the customer's needs at a particular location, or does it entail that wherever the customer purchases local exchange service, it must be from the requesting carrier? What happens if, after the original certification, the customer decides to purchase back-up local exchange service from another provider for purposes of redundancy? And how is the certifying carrier supposed to keep track of its customer's relationships with other carriers? The Commission has never provided any guidance on any of these or other questions. It has simply acquiesced in whatever interpretation the ILECs have placed on this vague language.

The second safe harbor requires the requesting carrier to certify that it "handles at least one third of the end user's local traffic measured as a percent of total end user customer local dialtone lines; and for DS1 circuits and above, at least 50 percent of the activated channels on the loop portion of the loop-transport combination have at least 5 percent local voice traffic individually, and the entire loop facility has at least 10% local voice traffic. When a loop-transport combination includes multiplexing [] each of the

[18] *Id.*
[19] This curious restriction comprises the infamous ban on commingling.

individual DS1 circuits must meet this criteria."[20] As with the first safe harbor, the circuit must terminate in a collocation arrangement and cannot be connected to ILEC tariffed services. No guidance is given as to how a carrier is supposed to make a certification based on information which only the customer can possess. Nor does the description provide assistance with how to calculate usage percentages where one or more channels may be used to provide packet-based services, while others are used for traditional circuit-switched services.[21] Again, the Commission has never interceded on behalf of competitive carriers, but has simply allowed the ILECs to interpret these provisions as they see fit.

The third safe harbor requires a requesting carrier to certify that at least 50 percent of the activated channels on a circuit are used to provide originating and terminating local dialtone service and at least 50 percent of the traffic on each of these local dialtone channels is local voice traffic, and that the entire loop facility has at least 33 percent local voice traffic.[22] The multiplexing requirement and commingling ban also apply, though collocation is not required. As with the previous safe harbor, no indication is given of how to calculate what percent of a facility is "local" when not all channels provide circuit-switched services.

In adopting these so-called "safe harbors," the Commission reversed its prior conclusion not to allow audits. While prohibiting ILECs from requiring audits prior to

[20] *Supplemental Order Clarification,* ¶ 22.
[21] The Commission's apparent blindness in adopting these "safe harbors" to the growing importance of packet-based services is troubling. For a carrier offering an IP voice product as part of a unified data service, the Commission's rules make no sense at all. And even the ILECs acknowledge that this convergence is the fast-approaching future of telecommunications. According to SBC's Chief Technology Officer, "[t]he technology is going in a direction that ultimately will have all services commingled. So whether they're data or digital or voice, ultimately I believe all those will be commingled." Telecommunications Report, June 17, 2002.
[22] *Supplemental Order Clarification,* ¶ 22.

conversion, the Commission noted that several parties agreed that ILECs requesting an audit should hire and pay for an independent auditor, and that the CLEC should reimburse the ILEC if the audit uncovers noncompliance with the local usage options.[23] The Commission required ILECs to give at least 30 days written notice that it will conduct an audit, and prohibited ILECs from auditing the same company more than once per year unless an audit finds noncompliance.[24] The Commission agreed with U S West that "records that demonstrate that a requesting carrier's unbundled loop-transport combination is configured to provide local exchange service should be adequate to support the carrier's certification without the need for extensive call detail records."[25] Finally, the Commission agreed with the ILECs and certain CLECs that audits must not be a routine practice, and will be undertaken only when the ILEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service.[26]

IV. The NuVox Petition

After receiving a multi-state request for EEL audits from BellSouth, without a disclosure of any particularized concerns, NuVox filed the instant petition asking the Commission to declare that virtually every element of BellSouth's request does not comply with the audit process established in the *Supplemental Order Clarification*. Specifically, NuVox has requested that the Commission declare that: (1) audits may be undertaken only after notification of a specific, bona fide concern of CLEC noncompliance; (2) when such a concern is disclosed the ILEC must show that it has

[23] *Id.,* ¶ 31.
[24] *Id.*
[25] *Id.,* ¶ 32.
[26] *Id.,* ¶ 31, footnote 86.

retained an independent auditor; and (3) a consulting shop composed of individuals with ILEC backgrounds and with a corporate mission to create revenue for ILECs does not constitute an independent auditor.[27] The Joint Commenters strongly agree with NuVox that the Commission should, by declaratory ruling, state that BellSouth's request is unlawful.

Declaratory relief is available to terminate a controversy or to remove uncertainty when the facts are clearly developed and essentially undisputed, and the governing law is clear.[28] That is, there must be a controversy raised by clearly developed, undisputed facts, governed by clear legal principle or precedent, and which the requested declaration would terminate. Here, the Commission's rules plainly do not allow an ILEC such as BellSouth to request routine EEL audits, without any particularized concern of non-compliance, to be performed by an entity that markets itself as skilled in augmenting ILEC revenues. By declaring this to be so, the Commission would end this controversy.

In its very first paragraph, the *Supplemental Order Clarification* lifted the prior total ban on EEL audits, and authorized ILECs to "conduct limited audits by an independent third party." The Commission later elaborated that these limited audits could be conducted in only one circumstance – where the ILEC has a concern that a requesting carrier has not met the criteria for providing a significant amount of local exchange service.[29] The Commission necessarily intended that such a concern would be

[27] NuVox Petition at 2. NuVox also asks the Commission to establish rules to govern what happens if a particular circuit is found to be non-compliant. We do not specifically address this element of the NuVox petition. Instead, for reasons given below, we urge the Commission to suspend all audits until either the use restrictions are eliminated, or the Commission resolves certain inherent contradictions and ambiguities in the *Supplemental Order Clarification.*

[28] *American Network Inc*., 4 FCC Rcd 550, 551 at ¶ 18 (CCB 1989).

[29] *Supplemental Order Clarification* at ¶ 31, footnote 86.

legitimate and particularized. Otherwise, the ILECs would have unlimited audit rights – an outcome which the *Supplemental Order Clarification* explicitly rejected.

BellSouth appears to have sought an audit of *every single EEL* that NuVox is purchasing. BellSouth's request is not limited by state, customer type, product, or in any other conceivable way. BellSouth has plainly launched a fishing expedition for EELs. Indeed, BellSouth recently filed an *ex parte* letter with the Commission in which it disclosed that it has sought similar, unlimited audits of thirteen CLECs.[30] This type of behavior in no way conforms to the limited audits contemplated by the *Supplemental Order Clarification.* Accordingly, the Commission should declare that all audit requests must be supported by a particularized concern of non-compliance with the use restrictions. Moreover, since requesting carriers certify compliance on a circuit-by-circuit basis, the Commission should also declare that audit requests, and related concerns of non-compliance, must be made on a circuit-by-circuit basis. Even if there are circumstances in which an ILEC believes that one circuit does not meet local usage requirements, absent extraordinary circumstances, such a belief provides no basis for a survey of all circuits.

BellSouth's chosen auditor must also be rejected as non-compliant with the limited audit process allowed by the *Supplemental Order Clarification.* Therein, the Commission emphasized that any audit would be performed by an *independent* third party. The Commission has previously relied on standards established by the American

[30] Letter from Whit Jordan to Marlene H. Dortch (filed June 20, 2002), CC Docket No. 96-98. According to this letter, BellSouth is seeking to audit MCI, NuVox, XO, NewSouth, Intermedia, Florida Digital Network, Madison River, cbeyond, IDS, mpower, e.spire, Allegiance, and ITC^DeltaCom.

Institute of Certified Public Accountants as guarantors of auditor independence.[31] Those standards provide that independent auditors must not only be independent in fact, "but also should avoid situations that may impair the appearance of independence."[32] Thus, even an appearance of partiality may require a conclusion that an auditor is not independent. In this case, BellSouth retained an "auditor" that appears to be little more than a consultant to ILECs. This firm markets its success generating millions of dollars in revenue for its ILEC clients.[33] Moreover, it appears that this enterprise has performed numerous, non-audit-related consulting services for ILECs. Presumably, any "success" in this audit will later be touted to other ILECs. The Commission must declare that only a truly independent party – one that does not evaluate an audit's "success" by the revenue generated for its client – can perform a limited EEL audit.

V. The Commission should suspend all EEL audits.

BellSouth made its audit request at a point in time when it would be particularly wasteful to conduct audits. In the coming months, the United States Court of Appeals for the D.C. Circuit will rule on the lawfulness of use restrictions. And the Commission itself will, presumably, finally resolve the issues that purportedly led it to adopt this "temporary constraint". Until these matters are resolved, it simply makes no sense for any EEL audits to proceed.

When the Commission first adopted this use restriction in the *Supplemental Order*, it recognized that since the restriction would be in place for less than a year, audits would be utterly wasteful and unnecessary. Accordingly, the Commission did not allow

[31] *In re Application of Ameritech Corp. and SBC Communications, Inc. For Consent to Transfer Control,* CC Docket No. 98-141, Memorandum Opinion and Order (rel. October 9, 1999), ¶ 504, footnote 923.
[32] *Id.,* citing American Inst. Of Certified Pub. Accountants, ATTESTATION STANDARDS, AT § 100.26.
[33] *See* NuVox Reply (filed June 26, 2002), Attachment B.

audits at that time. The industry is in that exact same position now. The Commission should again prohibit audits, given the short time horizon in which the use restriction is likely to be in place.

In less than three months, the United States Court of Appeals for the D.C. Circuit will hear oral argument in Case No. 00-1272, CompTel v. FCC. In that appeal, CompTel and supporting intervenors (including WorldCom) argue that the use restriction is unlawful. The court is likely to decide this case in a matter of months. If the Court overturns the use restriction, these audits will be irrelevant and any monies gained by BellSouth will have to be disgorged. In this circumstance, the audits will turn out to have been a total waste of time and resources. The Commission should suspend all audits until this case is decided in order to avoid such waste.

The Commission is itself finally considering the questions that purportedly gave rise to the use restriction, as part of its *Triennial Review.*[34] It is widely anticipated that the Commission will complete this proceeding sometime around the end of the year. Again, it simply makes no sense to waste time and resources auditing a use restriction with so limited a shelf life. The Commission clearly acknowledged this in the *Supplemental Order*, and should do so again here.

In the unlikely event that the appellate court approves of the use restriction *and* the Commission decides to retain it, the Commission should still suspend all EEL audits until it has time to address a series of unresolved questions on the use restrictions. For example, the safe harbors appear require carriers to certify that certain percentages of "local" usage will be met. As pointed out above, the Commission has given no guidance

[34] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338.

on how to calculate those percentages where part of a circuit is used for packet transmissions. Moreover, the Commission has also explicitly stated that any audit should not include a review of call detail records. The Commission may have to reconcile this statement with the safe harbors themselves, which appear to contemplate some calculation of usage.

The Commission has also not indicated exactly what would be reviewed in an EEL audit. Usage may vary widely. An audit that looked at one month might not provide a very accurate picture of usage over a longer period of time, such as a year. Moreover, what relevance would a finding about a particular circuit in a particular time frame really have? Would such a finding mean that the CLEC must pay the entire cost of the audit, even if every other circuit was found to be compliant? And why couldn't the CLEC simply respond to the audit by filing a waiver request with the Commission?[35]

These questions are of course symptomatic of just how arbitrary the use restriction and the safe harbors really are. Nonetheless, if the Commission decides to retain that restriction, it should address these questions before allowing audits to proceed.

VI. Conclusion

The Commission should put an end to BellSouth's unbounded audit requests by declaring that all such requests must include a particularized concern of non-compliance with the Commission's rules, must be made on a circuit-by-circuit basis, and must identify a truly independent third party auditor. Moreover, the Commission should

[35] The *Supplemental Order Clarification* expressly recommended that CLECs providing local service that could not show compliance with the safe harbor requirements seek a waiver. A CLEC offering local service that in good faith sought an EELs conversion would appear to be an excellent candidate for such a waiver.

declare a moratorium on all EEL audits unless it is determined that the use restriction will remain in place for longer than a few months.

Respectfully submitted,

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